

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-217490

DATE: October 4, 1985

MATTER OF: Gary R. Clarke, et al. - Overtime Pay
for Standby Duty

DIGEST:

Civilian employees at Kirtland Air Force Base are required to perform stockpile emergency verification duty during non-duty hours approximately 6 or 7 times a year. Their claim for overtime compensation for standby duty performed outside their basic duty hours may not be allowed since they are not restricted to their living quarters or post of duty, but are allowed to carry a pager for the purpose of being contacted. See 5 C.F.R. § 550.143(b)(3).

Pursuant to Part 22, Volume 4 of the Code of Federal Regulations (C.F.R.), Mr. John A. Lattin, President of Local 2263, American Federation of Government Workers, Albuquerque, New Mexico, has requested our decision concerning the entitlement of certain employees at the Kirtland Air Force Base (AFB), New Mexico, to overtime compensation for standby duty performed outside of their regularly scheduled duty hours. The Air Force has not submitted comments on this matter. For reasons explained below, we hereby hold that the duty performed by the employees represented by Mr. Lattin is not compensable standby duty.

Gary R. Clarke, Mary J. C. Garcia, Dorothy J. Lockhart, Anthony Navarrete, and Ida O'Guinn are GS-9 employees within the Stockpile Control Division, Field Command, Defense Nuclear Agency, Kirtland AFB. In connection with their positions, they are required to perform what is known as Stockpile Emergency Verification (SEV) duty. An SEV is a plan for an emergency inventory of all weapons in the possession of the Department of Defense or the Department of Energy when it is alleged that one is missing or stolen. Employees are assigned to be on call for the performance of this duty for a week at a time, approximately 6 or 7 times a

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year. During that week, the employee is required to call in daily at 1630 hours on weekdays and at 0900 hours on weekends. The employee is given a paging device with a 12-15 mile range which he is required to carry if he leaves his home. If he must leave the area, he is permitted to obtain a replacement.

Mr. Lattin contends that this is compensable standby duty because the restrictions imposed on these employees during nonduty hours are substantial since they must be in a state of readiness to initiate an SEV and must remain within the range of the pager. He says that until just recently, the employees did not know that the pager's range was 12 to 15 miles and thus had restricted their activities more than was necessary. He also argues that these restrictions are substantial in terms of the time involved since the employees are on call 6 or 7 weeks a year and each week involves 128 hours of nonduty time.

The employees feel that SEV duty is especially onerous because each employee is solely responsible for answering a call as opposed to the situation where several people are on call and, if one person is not available, the next person on the list is called. They also point out that this duty was performed by military personnel at Kirtland AFB prior to 1981 and that the duty is not contained in their position descriptions.

These employees are exempt from coverage under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. As a result, their entitlement to overtime is governed by the overtime provisions of Title 5, United States Code. Authority to reimburse a General Schedule employee for standby duty is contained in 5 U.S.C. § 5545(c)(1) and authority to pay for overtime work performed is contained in 5 U.S.C. § 5542.

Section 5545(c)(1) authorizes the head of an agency to pay premium pay on an annual basis to an employee in a position "requiring him regularly to remain at, or within the confines of his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work * * *."

The implementing regulation, found at 5 C.F.R. § 550.143(b)(3), specifies that "at, or within the confines of his station" includes:

"(3) In an employee's living quarters, when designated by the agency as his duty station and when his whereabouts is narrowly limited and his activities are substantially restricted. This condition exists only during periods when an employee is required to remain at his quarters and is required to hold himself in a state of readiness to answer calls for his service. This limitation on an employee's whereabouts and activities is distinguished from the limitation placed on an employee who is subject to call outside his tour of duty but may leave his quarters provided he arranges for someone else to respond to calls or leaves a telephone number by which he can be reached should his services be required."
(Emphasis added).

In our opinion, these employees' claims fall within the purview of the underlined portion of the above-cited regulation. Although their activities are restricted and they are required to remain in a state of readiness to perform work, they are not restricted to their living quarters or designated post of duty, but are allowed to carry a pager for the purpose of being contacted and are allowed to arrange for a replacement.

The United States Claims Court recently considered a case involving deputy United States marshals who were assigned for a week at a time on a rotating basis to be on call to perform law enforcement duties arising during off duty hours, and sought premium pay for the time spent on duty officer assignments. The court held that since during these on-call periods the marshals were free to follow their own individual private pursuits subject only to requirements to remain sober, to remain within beeper's range, and to maintain logs of referred calls, this duty was not compensable under section 5545(c)(1) of Title 5, United States Code. Allen v. United States, 1 Cl. Ct. 649 (1983), aff'd, 723 F.2d 69 (Fed. Cir. 1983).

The circumstances of the on-call duty which Mr. Lattin describes are not sufficiently different from the on-call duty of the marshals in Allen v. U.S., cited above, so as to enable us to distinguish this case from that one. Nor are the restrictions imposed on these employees more onerous than those placed on other employees whose claims for standby overtime under Title 5 we have previously denied.

For instance, in Lee S. Shenk, B-205442, March 22, 1982, we denied a claim for premium pay for standby duty where an employee who was required to occupy government-furnished quarters was required to be at his residence from approximately 5-6 p.m. until 8 a.m. the next morning for 1 or 2 nights per week. Since he had no other duties to perform while at home and because he was free to leave his residence as long as he provided for a replacement to whom calls could be diverted, we found he was not entitled to standby premium pay under 5 U.S.C. § 5545(c)(1).

We reached the same conclusion concerning premium pay for standby duty in Charles F. Callis, B-205118, March 8, 1982. In that case, the claimants, who were Supervisory Customs Inspectors, were expected to be available by telephone or to carry an electronic beeper during their off-duty hours so as to be able to respond within 15 to 20 minutes. As a consequence, they argued that their activities were so restricted that they could not attend ball games and church, or go fishing, golfing, hunting, or shopping. And in Glen W. Sellers, B-182207, January 16, 1975, we denied standby pay to a Medical Technical Assistant at the Federal Reformatory in Petersburg, Virginia, who, like the employees at Kirtland AFB, was placed on a call-back roster for periods of 7 days at a time, and was required to stay within a 10-15 miles radius for beeper paging.

Neither do we think that the restrictions placed on these employees while on standby duty during the period in question qualifies them for overtime compensation under 5 U.S.C. § 5542, which provides in pertinent part as follows:

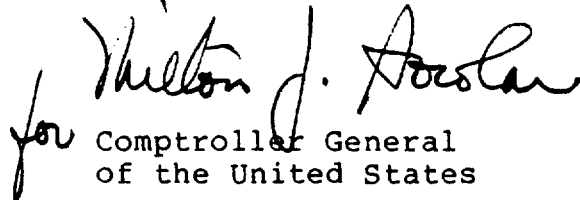
"(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or * * * in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter at the following rates * * *"

In order to qualify for overtime compensation under this provision, the claimant must establish that the on-call time at home constituted "hours of work" within the meaning of those words as used in the law. In Rapp and Hawkins v. United States, 167 Ct. Cl. 852, 340 F.2d 635 (1964), and in Moss v. United States, 173 Ct. Cl. 1169, 353 F.2d 746 (1965), the U.S. Court of Claims concluded that

where an employee is allowed to stand by in his own home with no duties to perform for his employer except to be available to answer the telephone, the time spent in such capacity does not amount to "hours of work" under the above-cited statute and is not compensable. The Rapp case involved an employee who was required once or twice a month to remain at home from the end of work in the afternoon until the following morning to answer the telephone for any emergency calls received during that time. He was free to leave his residence whenever necessary, provided he notified his supervisor so that calls could be diverted in his absence. The Court of Claims held that the employee was not entitled to overtime compensation under those circumstances inasmuch as the time so spent was not predominantly for his employer's benefit.

With regard to the contention that SEV duty is not included in the position description of these employees, we note that the Civilian Personnel Officer at Kirtland AFB agrees that it should be included. The inclusion of this duty, however, will have no effect on the employee's overtime claim. Its only possible effect would be to require a change in the classification, grade, or pay rate of the position. We note that the Civilian Personnel Officer states that this requirement would not affect those things. Any arguments that it does should be directed to the Office of Personnel Management, which has jurisdiction over classification matters.

For the reasons set forth above, the employees represented by Mr. Lattin are not entitled to compensation for the SEV duty which they perform.


for Comptroller General
of the United States